No. 89-1416

In The

Supreme Court of the United States

October Term, 1990

AIR COURIER CONFERENCE OF AMERICA,

Petitioner,

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. INTRODUCTION

1. Respondent Unions circumvent their complaint's assertion of a violation of the PES, by asserting a violation of the PRA in their brief. The Unions apparently concede that postal employees were not within the zone of interests of any restriction on the private carriage of letters from 1792 to 1970. The Unions now insist that Congress' recodification of the civil provisions of the PES in the 1970 PRA gives them standing to challenge the International Remail Rule, because the PES suspension provision, 39 U.S.C. § 601, is now in the PRA; passage of the PRA involved "special solicitude" for postal employees; and that they, therefore, have standing because they are within the zone of interests of the PRA. The Unions' line of reasoning simply does not follow.

The Unions misapply *Clarke v. Securities Industry Association* by relying on the PRA to establish standing, because: (1) their complaint invokes a violation of the PES, not the PRA; (2) the PRA has no common purpose with the PES and is otherwise unhelpful in understanding Congress' overall purposes in the PES; and (3) whatever "special solicitude" was accorded postal employees in enacting the 1970 reforms that the Unions opposed, Congress did not then recognize any interest of postal employees in the enforcement of any restrictions on the private carriage of letters.

2. If APA standards do not apply, the Unions lack standing because the Unions have failed to demonstrate that the PES were enacted for the "especial benefit" of postal employees. Even if the PRA were relevant, the Unions' opposition to postal reform belies the notion that

its enactment was for their "especial benefit." The Unions' attempt to show a "special solicitude" towards postal employees during the legislative process of the PRA is factually flawed and legally insufficient to confer standing.

3. The Unions err in attempting to justify the Court of Appeals' substitution of its judgment for the Postal Service's on whether the International Remail Rule is in the public interest by arguing irrelevant case law, resorting to the 1973 Board of Governors' Report, and asserting a failure to discuss "cream-skimming." The Board's general comments about the PES in 1973 are irrelevant to whether the 1986 rulemaking record supports the rule. Cost-based pricing required by the PRA moots cream-skimming arguments, the Justice Department found those arguments unpersuasive, and the Postal Service overcame them by finding that potential revenue losses did not outweigh the public interest.

4. ACCA opposes the Postal Service's attempt to present the issue of the reviewability of Postal Service rules. The Postal Service did not raise this issue below and it is not fairly comprised within the questions presented by petitioner. The International Remail Rule is reviewable under the APA because (1) neither the 1970 PRA nor its legislative history demonstrate Congress' intent to repeal the APA's applicability to the Postal Service's exercise of purely governmental functions, and (2) the Postal Service's adoption of the APA by regulation affords APA remedies to the proper parties. In any event, Postal Service rules are reviewable under common law principles.

II. DISCUSSION

A. THE UNIONS HAVE NOT ESTABLISHED STANDING UNDER THE STATUTE ALLEGED TO HAVE BEEN VIOLATED

1. The Unions Apparently Concede That They Are Not Within the Zone of Interests of the PES

The Unions' brief invokes the wrong statute to establish their standing to sue. The opening sentence of the Unions' complaint states:

> 1. *This is an action* for declaratory and injunctive relief or in the alternative, for a writ of mandamus, *to challenge the authority of the United States Postal Service ("USPS") to issue regulations suspending the operation of the Private Express Statutes ("PES"), 39 U.S.C. §§ 601-606, and 18 U.S.C. §§ 1693-1699, 1724,* for the international remailing where it has not demonstrated that the public interest requires the suspension within the meaning of 39 U.S.C. § 601(b).

Jt. App. 107 (emphasis added). The charging paragraph of the complaint states in part:

> WHEREFORE, plaintiffs respectfully request that this court provide the following relief:
>
> (a) a declaratory judgment that *defendant's action promulgating 39 C.F.R. § 320.8 violated the PES*[.]

Id. at 111 (emphasis added). The complaint mentions the PES ten times. *Id.* at 107-111. It never mentions the PRA.

The Court recently explained in *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3186 (1990), that

> to be adversely affected or aggrieved within the meaning of a statute, the plaintiff must establish that the injury he complains of . . . falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

Notwithstanding the complaint's exclusive reliance on the PES and the clear indication of the PES's relevance in *Lujan*, the Unions' brief fails to discuss the zone of interests of the PES at all. In so doing, the Unions apparently concede that postal employees were never the intended beneficiaries of the restrictions on private carriage of mail and that they were not within the zone of interests of the PES at the times of their piecemeal enactment.[1]

The Unions now argue that the zone of interests test is "statute-specific," that "the inquiry concerns the entire statute," and suggest that they need only establish that they are *"within the PRA's overall zone of interests."* Unions' Br. at 28-29 (emphasis added). The Unions have sought to establish their standing on the basis of the wrong statute.[2]

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[1] The Unions err in dismissing the court reporter example in *Lujan* that clarifies the explanation of the zone of interests test in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), with the argument that it does "not overturn any aspect of *Clarke*." Unions' Br. at 30. ACCA does not contend that *Lujan* overruled *Clarke*, but that *Lujan* confirms that the Court of Appeals erred in relying on *Clarke* for its holding that the Unions have met the zone of interests test of standing.

[2] The Unions' attempt to shift the focus of the zone of interests inquiry from the PES to the PRA occurs in their misleading assertion that

> *Lujan* is cited [by ACCA and the government] in support of their argument that, to demonstrate their standing, the Unions have the burden of showing that they are within the zone of interests protected by section 601 of the PRA – the section the Postal Service is alleged to have violated – and not within the PRA's overall zone of interests.

Unions' Br. at 29.

The Complaint alleges the violation of the entire PES, not simply § 601, which the Unions included in the broad definition of the

2. Partial Recodification Of The PES Does Not Establish The Relevance Of The Zone Of Interests Of The PRA

The Unions offer no satisfactory explanation of why the zone of interests of the PRA is relevant when they complain of a violation of the PES. They repeatedly return to the recodification of the civil provisions of the PES in the PRA. Hopscotching among various statutes and provisions, the Unions seem to argue that although they alleged a violation of the PES generally, they really rely on the PES suspension provision, § 601(b), for the alleged violation; that § 601(b) is now a PRA provision; and that, therefore, it is the legislative purpose of the PRA generally that determines their standing under the zone of interests test. That argument fails to meet the test of relevance established by this Court and indeed assumes that which the Unions must first establish.

To be relevant to the zone of interests of the PES, the PRA must (1) share an "identity of purpose"[3] or "single, unified purpose"[4] with the PES, see *Association of Data Processing Services Organizations v. Camp*, 397 U.S. 150, 155 (1970), and (2) "help[ ] us understand Congress' overall purposes in" the PES. *Clarke v. Securities Industry Association*, 479 U.S. 388, 401 (1987).

PES, not in the PRA (as they now attempt to redefine it). Accordingly, ACCA contended that the zone of interests inquiry involved the historical restrictions on the private carriage of letters beginning in 1792, not simply § 601(b), discussion of which was limited to mere mention of its adoption in 1864. *See* ACCA Br. at 30 n.43.

[3] *Community Nutrition Institute v. Block*, 698 F.2d 1239, 1250 (D.C. Cir. 1983), *reversed on other grounds*, 467 U.S. 340 (1984).

[4] *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 141 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

The Unions attempt to meet the identity of purpose test by declaring that "the PRA is a single, unified statute which was enacted in its entirety at a single time." Unions' Br. at 39. The Unions confuse statutory form with legislative purpose. The Unions' assertion that the PRA is a "unified statute" begs the question of why the PRA is even relevant to the zone of interests of the PES. The Unions have not met the identity of purpose test.

The Unions have also failed to meet the second condition for consideration of the PRA: that it help explain Congress' overall purpose in enacting the PES. Indeed, the Unions never even attempt to tie any provision or legislative history of the PRA to any interpretation of Congress' purpose in the PES. Apparently recognizing that there is nothing in the PRA or its legislative history that is helpful in explaining the purpose of the PES, the Unions stay with the PRA only to conclude that the PES are "integral parts of the overall legislative enactment" of the PRA. Unions' Br. at 38. Even if that were true, it would be beside the point. Nothing in the Unions' lengthy discussion of the PRA is even remotely helpful to understand the purposes of the recodified civil code PES provisions now in the PRA, the criminal code provisions of the PES that were not recodified, or any reason for recodification that would implicate postal employees' interests.

In short, the "interplay" between the PES and PRA found by the Court of Appeals to give the Unions standing under the PES is a matter of form, not substance, and fails to meet this Court's two-pronged test of relevance of the PRA.

3. The Purported "Special Solicitude" Accorded The Unions During Negotiations For Compromise Postal Reform Legislation Does Not Confer Standing

Having failed the "purpose" and "helpfulness" tests, nothing the Unions say about the enactment of the PRA is relevant to their standing to sue under the PES. It is nevertheless worth noting that the Unions have retreated from relying upon the benefits purportedly conferred on their members by the PRA to support the Court of Appeals' finding of an "interplay" between the PES and PRA, as the basis for standing. The Unions do not dispute ACCA's exposition of the legislative history demonstrating their opposition to the labor reforms and other provisions of the PRA on grounds that it would hurt postal employees and diminish their employment opportunities. ACCA Br. at 35. Having abandoned the refuted contention that the PRA benefited postal employees, the Unions' now rely upon the "special solicitude" shown the Unions during the PRA's legislative process. Such "solicitude" is an even weaker basis than the purported benefits for the "interplay" between the statutes and therefore insufficient to confer standing under the zone of interests test.

Indeed, the Unions' support for that "solicitude" falls far short of establishing congressional intent of any kind. President Nixon's message about an agreement with postal unions hardly reflects Congress' intent. *See* Unions' Br. at 33-34. Nor can the Board of Governors' Report[5] issued two years after enactment of the PRA pass for legislative history of that Act. *See* Unions' Br. at 38.

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[5] United States Postal Service Board of Governors, *Statutes Restricting Private Carriage of Mail and Their Administration*, Com. Print No. 93-5, 93d Cong., 1st Sess. (1973).

Indeed, the Report fails to mention postal employees at all. The 1970 "wildcat" postal strikes are equally far-fetched as expressions of Congress' intent.[6] Putting all this extraneous material aside, all that remains are sweeping generalizations about the benefits of postal reform. They have nothing to do with restrictions on private carriage of letters or the suspension provision, let alone postal employees' interests in those provisions. Whatever it is, "special solicitude" does not establish the Unions' standing to enforce the PES or even the PES provisions now in the PRA.

B. THE UNIONS LACK STANDING UNDER ANY NON-APA TEST BECAUSE THEY FAIL THE TEST OF STANDING FOR APA CASES

It is unimportant to the determination of the standing question presented whether the APA applies or not, because the Unions cannot establish standing under any test for non-APA cases if, as demonstrated, they cannot meet the "generous" test of standing applying to APA cases articulated in *Clarke*. Given that the Unions have not even attempted to make a case that they are within the zone of interests of the PES independent of the PRA, it is clear that they cannot establish that the PES were enacted for postal employees' "especial benefit" under

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[6] The Unions' reliance upon the strike is particularly curious because the unauthorized strike weakened union leaders' ability to avert the joinder of the postal reorganization legislation they opposed with the pay increase legislation they favored. *See generally*, H. E. Dolenga, *An Analytical Case Study of the Policy Formation Process (Postal Reform and Reorganization)* 541-542, 550-551 (1973). Thus the strike and resulting compromise were a net loss for postal employees and reflect no solicitude toward them.

the test of standing in non-APA cases to which the Court alluded in footnote 16 of *Clarke*, citing *Cort v. Ash*, 422 U.S. 66 (1975).

However, as with their zone of interests argument, the Unions rely on the PRA for standing. Unions' Br. at 41-42. It is the PES they invoked to challenge the remail rule. The Unions' opposition to the PRA weighs even more heavily against a showing that the PRA was enacted for the "especial benefit" of postal employees, than against any inference that they are within the class Congress intended to enforce the restrictions on the private carriage of letters. The Unions err in equating the "special solicitude" they claim to have been accorded during the legislative process with a congressional intent to confer an "especial benefit" on postal employees. In any event, the *Cort v. Ash* test includes three other factors which the Unions have failed to address. While the Unions' inability to meet the especial benefit test obviates any need to resolve the three other factors, their failure to satisfy the other prongs dooms their claim of non-APA standing.

C. THE UNIONS' FAILURE TO RAISE ANY LEGAL ISSUE CONCERNING THE PUBLIC INTEREST TEST CONFIRMS THE COURT OF APPEALS' IMPROPER SUBSTITUTION OF ITS JUDGMENT FOR THE POSTAL SERVICE'S

Instead of identifying some legal infirmity in the Postal Service's interpretation of the public interest standard of § 601, the Unions argue (1) that the public interest standard has some limits; (2) that in 1973 the Board of Governors opposed repeal of the PES; and (3) that the Postal Service was concerned about "cream-skimming" in the 1979 urgent letter proceeding. We fail to see how any

of this helps the Unions establish the arbitrariness of the International Remail Rule.

First, the Court in *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 670-671 (1976), upon which the Unions rely (Unions' Br. at 43), held that the public interest standard of the Natural Gas and Federal Power Acts did not direct the Federal Power Commission to eradicate employment discrimination, absent some indication in the statutes or their legislative histories.[7] The Unions do not contend that any limits on the public interest standard set in *NAACP* have been exceeded here. That discrimination is not within the meaning of the public interest standard of the Natural Gas and Federal Power Acts is of no consequence to whether the Postal Service properly found the remail rule to be in the public interest under § 601(b).

Second, while *NAACP* directs attention to the statute and legislative history to determine whether discrimination was within the purposes of the regulatory legislation, the Unions point only to the general comments in the Board of Governors' 1973 Report. Unions' Br. at 43. These comments do not evidence Congress' intent or address the public interest test.

Third, the Unions' err in relying on the Postal Service's comments concerning "cream-skimming"[8] in considering the urgent letter rule, Unions' Br. at 44, to create

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[7] Rather than offer the Unions any comfort on the merits, *NAACP*, if anything, detracts from their standing arguments. Without anything in the legislative history of § 601(b), the public interest standard cannot give rise to an interest in promoting postal employment any more than it gives rise to discrimination claims.

[8] "Cream-skimming" is an unfair pejorative description of a competitor eroding a monopolist's economic rents through competition, an essential and desirable feature of market economies.

any legal issue as to the application of the public interest standard in the remail rule proceeding. The PRA was intended to eliminate cross-subsidies between classes of service that make "cream-skimming" possible.[9] Moreover, the Department of Justice specifically addressed "cream-skimming" arguments in the remail rule proceeding and found them "unsound as a matter of economic policy." Jt. App. 36-37. Thus, the cream-skimming arguments[10] are inconsistent with the PRA, make no economic sense, and were considered and laid to rest when the Postal Service issued the remail rule after taking worst case revenue loss projections into consideration.[11]

D. THE INTERNATIONAL REMAIL RULE IS SUBJECT TO JUDICIAL REVIEW

The Postal Service supports ACCA on both questions presented. However, the Postal Service seeks to bypass

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[9] *See* Moore, *The Federal Postal Monopoly: History, Rationale, and Future, Free the Mail* 65 (1990).

[10] It is debatable whether the "cream-skimming" theory ever had validity, given that historically it was the private expresses, not the Post Office, that opened frontier areas to mail service. This refutes the notion that cross-subsidies from postal services priced above competitive levels on which cream-skimming was possible were needed to establish and maintain service to distant, sparsely populated areas. The fact that today at least two private firms, Federal Express and United Parcel Service, provide delivery services to every address in the United States should lay the cream-skimming theory to rest once and for all.

[11] The Unions' argument that the "only real consequence of the remailing suspension was to release international remailers from the time and cost requirements of the urgent letter rule," Unions' Br. at 45, appears to acknowledge that the Postal Service's worst case estimate of revenue losses are unrealistically high.

those questions by presenting the argument that the International Remail Rule is not subject to judicial review at all.[12] ACCA opposes the Postal Service's attempt to raise the reviewability issue. ACCA respectfully requests that the Court adhere to its normal practice of refraining from addressing issues not raised in the court of appeals, see, e.g., *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986), or fairly included in the questions presented in the petition for writ of certiorari. *See* Supreme Court Rule 14.1.[13]

1. PRA § 410(a) Did Not Repeal Application Of The APA To Postal Services Regulations Suspending The PES

Both courts and all parties below assumed that the International Remail Rule was reviewable and that the APA provided the statutory framework for review. The Postal Service now argues that § 410(a) of the PRA precludes judicial review under the APA.

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[12] It is inconceivable that had the Postal Service issued a rule banning international remail, thereby imposing potential criminal penalties on remailers' activities, remailers would have been precluded from judicial review.

[13] The Postal Service argues that the reviewability issue has not been waived since it is "in effect jurisdictional," citing *Block v. Community Nutrition Institute*, 467 U.S. 340, 353 n.4 (1984). This argument is misplaced because it addresses the sufficiency of the Unions' complaint, not the lower courts' jurisdiction to hear the case. *See* 39 U.S.C. §§ 401, 409. Moreover, the Postal Service does not contend that its non-reviewability theory creates a "defect" that goes to this Court's jurisdiction pursuant to Supreme Court Rule 15.1. Finally, *Block v. Community Nutrition* does not appear to have involved waiver, but merely a reason for not reaching the issue of standing under the Agricultural Marketing Agreement.

Section 410(a) provides with certain exceptions, that "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service." The Postal Service interprets § 410(a) as a wholesale exemption from the APA. USPS Br. at 10. The Unions believe that § 410(a) "deals only with laws governing *internal agency operations* . . . and the APA is inapplicable only with respect to administrative actions on those subjects." Unions' Br. at 16. ACCA submits that the Postal Service's interpretation is too broad and the Unions' may be too narrow.

The Postal Service and the Unions ignore three factors that undermine the Postal Service's blanket repeal interpretation: First, what is now PRA § 410(a) derived from § 2114 of former Title 39,[14] which did not exempt the Post Office from any part of the APA. Thus, prior to 1970, Post Office actions in general, and suspensions of the PES, in particular, *were* subject to judicial review under the APA.

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[14] Section 2114 of former Title 39 provided:

> Sections 34 and 259 of title 40, and sections 12 and 14 of title 41, and any other provision of law, except applicable labor standards provisions, relating to the acquisition or disposal of real property, construction of buildings, or leasing of space, do not apply to any of the functions performed by the Postmaster General in effectuating the purposes of sections 2103-2116 of this title, except as provided by sections 2111 and 2112 of this title.

39 U.S.C. § 2114, Pub. L. 86-682, 74 Stat. 593 (Sept. 2, 1960).

Second, Congress in recodifying the PES in the PRA expressed an intent not to change the PES in any substantive way. *See* H.R. Rep. No. 1104, 91st Cong., 2d Sess. 44 (1970) ("H. Rep.") ("chapter [14 of the PRA] continues without substantive change the portion of the private express statutes found in existing chapter 9 of title 39").

Third, although the PRA's reorganization of the Postal Service was intended to permit the Service to operate in a more "business-like" manner and to become self-supporting,[15] Congress made clear that the Postal Service would remain "an independent establishment of the executive branch of the Government of the United States."[16] The Postal Service thus emerged from the PRA as an institutional hybrid: part private enterprise along the lines of a regulated industry with management freedom, but subject to rate regulation; part government agency with important policy-making and regulatory powers.

Accordingly, to be consistent with this statutory history and institutional framework, § 410(a) should be read to exempt the Postal Service from the APA in its management activities, but to continue the APA's applicability to its governmental functions. In administering the PES, the Postal Service acts in a policy-making and regulatory capacity quite far afield from day-to-day management considerations.[17]

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[15] *See* H. Rep. at 5, 11-12, and 16-17; 39 U.S.C. § 3621 (authority to fix rates and classes); *Franchise Tax Bd. of Cal. v. Postal Service*, 467 U.S. 512, 519-20 (1984).

[16] 39 U.S.C. § 201; *see also* 39 U.S.C. § 409; *Franchise Tax Bd. of Cal., supra* n.15.

[17] This view is supported by *National Retired Teachers Ass'n v. USPS*, 430 F. Supp. 141 (D.D.C. 1977), *aff'd*, 593 F.2d 1360 (D.C. Cir. 1979), in which the district court rejected the Postal Service's contention that § 410(a) completely exempted it from chapter 5 of the APA, reasoning:

> [T]his contention is not supported by simple rules of grammar. According to the terms of § 410, in order to be exempt from chapter 5 of Title 5, a federal law must deal with public or Federal contracts, property, works, officers, employees, budgets or funds. *See, e.g., Chelsea Neighborhood Associations v. USPS*, 516 F.2d 378 (2d Cir. 1975). Inasmuch as § 553 does not, defendants' argument that the APA's notice and comment requirements do not apply to USPS is without merit.

430 F.Supp. at 147.

As the Unions point out, *National Easter Seal Society v. USPS*, 656 F.2d 754 (D.C. Cir. 1981), supports the Postal Service's position. However, that case did not involve the PES and was decided by the same court that applied the APA in this case. *Easter Seal* is therefore of dubious vitality.

[18] As noted by the Unions, see Unions' Br. at 15, the House Committee on Post Office and Civil Service characterized § 114 of the H.R. 17070, the cognate provision to § 410(a), as

> exclud[ing] the operation of Federal laws dealing

This Court has repeatedly acknowledged "the strong presumption that Congress intends judicial review of administrative action." *Traynor v. Turnage*, 108 S. Ct. 1372, 1378 (1988)(quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)). The presumption may be overcome "only upon a showing of clear and convincing evidence of a contrary legislative intent." *Traynor*, 108 S. Ct. at 1378 (citations omitted).

The legislative history of § 410 does not support a radical departure from pre-PRA law. Neither the House nor Senate Reports specifically mentions the APA. What little the reports say about § 410 is entirely consistent with the management versus governmental activities dividing line.[18]

In short, there is no clear and convincing evidence that § 410(a) was intended to preclude judicial review of Postal Service suspensions of the PES under the APA.[19]

2. The APA Also Applies Under The Postal Service's Regulations

Even if § 410(a) were to exempt the Postal Service from the APA altogether, the Postal Service's non-reviewability argument should be rejected because the Service has by regulation agreed to abide by the APA when promulgating regulations under the PES.

The exemption from Federal laws granted by § 410(a) applies "except . . . insofar as such laws remain in force as

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with Federal contracts, property, works, officers, employees or funds, except as provided in the title or in the bylaws of the Postal Service.

H. Rep. at 26. The House provision was ultimately dropped in conference in favor of the Senate version of § 410. The Committee Report on S. 3842 described the Senate version of § 410 as follows:

> The Board of Governors shall have broad authority and shall not, except as specified, be subject to Federal laws dealing with contracts, property, the civil service system, the Budget and Accounting Act of 1921, apportionment of funds, and other laws which in most instances apply to Government agencies and functions.

S. Rep. No. 912, 91st Cong., 2d Sess. 5 (1970).

[19] There is no indication that Congress had in mind the provisions of the PES as one of those ancient accretions of "legislative, budgetary, financial, and personnel policies that [were] outmoded, unnecessary, and inconsistent with . . . modern management and business practices," H. Rep. at 2, from which it wanted to exempt the Postal Service. *Cf. City of Rochester v. USPS*, 541 F.2d 967, 975 (2d Cir. 1976); *Chelsea Neighborhood Assocs. v. USPS*, 516 F.2d 378, 384 (2d Cir. 1975).

rules or regulations of the Postal Service." 39 U.S.C. § 410(a). The statute thus gives the Postal Service the power to continue in force laws which otherwise would not apply to it. Here, the Postal Service has by regulation continued the APA in force with respect to the Service's administration of the PES. Section 310.7 of 39 C.F.R. provides:

> Amendments of the regulations in this part [Enforcement of the Private Express Statutes] and in Part 320 [Suspension of the Private Express Statutes] may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act.

The "judicial review" provisions of APA chapter 7 are as essential to rulemaking as the "administrative procedures" of chapter 5. Undertaking to abide by APA procedures would be hollow indeed without concommitent judicial enforcement of those procedures.[20]

Section 310.7 must also be interpreted in light of (1) the Postal Service's recognition that the PES were historically administered through adjudication, (2) the Service's statement that rulemaking should be used in preference

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[20] When the new Postal Service issued comprehensive regulations under the PES in 1973, it noted that while a few formal regulations had been issued in the past, the PES were administered under an "essentially adjudicatory system" involving both administrative *and judicial* decisions. *See Proposed Comprehensive Standards for Permissible Private Carriage*, 38 Fed. Reg. 17,512 (July 2, 1973).

Comments on the proposed regulations expressed concern that they were unclear as to the Postal Service's commitment to follow the APA in making changes in the regulations. The Postal Service responded to these comments "through a blanket provision (§ 310.7) that all changes in the regulations will be made only consistently with the APA's rulemaking provisions." 39 Fed. Reg. 33,210.

to adjudication "where possible," and (3) the lack of any indication that regulations issued under the PES would not be subject to judicial review. Accordingly, the Court of Appeals correctly held that the Postal Service "has chosen to follow APA procedures when promulgating rules affecting the PES," and that "the APA provides the appropriate standards for evaluating the procedural and substantive issues in this case." Pet. App. 4a.

3. The International Remail Rule Is Reviewable Under Common Law Principles Of Administrative Law

The Postal Service argues that Postal employees do not have an implied private right of action under the PES. USPS Br. at 21-27. ACCA agrees, but notes that this argument begs the reviewability issue to which the Postal Service addresses it.

The question is whether the Unions can obtain judicial review of an agency action, not whether the Unions have an implied private right of action under the PES. The cases cited by the Postal Service have no application here, because they all involved private parties seeking to enforce federal statutes against *non*-federal persons in the manner of private attorneys general. The issue of whether a private party could obtain review of the action of a federal agency was not involved.[21]

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[21] In *Cort v. Ash*, 422 U.S. 66 (1975), the question was whether a private cause of action for damages against corporate directors was to be implied in favor of a corporate stockholder under a criminal statute prohibiting corporations from making contributions to federal election campaigns. *See* 422 U.S. at 68. In *California v. Sierra Club*, 451 U.S. 287 (1981), the Sierra Club sought to establish a private right of action under the Rivers and Harbors Appropriation Act of 1899 to enjoin California's construction of water diversion facilities for the California Water Project. *See* 451 U.S. at 289. Similarly, the question before the Court in *Karahalios v. Nat. Fed. of Federal Emp., Local 1263*, 109 S. Ct. 1282 (1989), was whether the Civil Service Reform Act of 1978 conferred on federal employees a private cause of action against a breach by a union representing federal employees of its statutory duty of fair representation. *See* 109 S. Ct. at 1284.

As the First Circuit made clear in the *Cousins* case,[22] also cited by the Postal Service, the labels "review of agency action" and "implied private right of action" are "reserve[d] for . . . entirely different situation[s]." 880 F.2d at 605. In the present case, the Unions are not asserting an implied private right of action. Therefore, the Postal Service's argument on this point is irrelevant.

Thus, ACCA agrees with the Unions that if judicial review is unavailable under the APA, it is nonetheless appropriate under common law principles that were firmly established even before the APA was enacted. The cases cited by both the Unions and the Postal Service attest to the continuing vitality of those common law principles because the APA was intended to broaden not preempt them. *See* Unions' Br. at 19-25; USPS Br. at 10 n.5.

Finally, the Postal Service ignores the provisions of 39 U.S.C. §§ 401 and 409, which waive sovereign immunity for the Postal Service and confer jurisdiction on the district courts in suits against the Postal Service.

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[22] *Cousins v. Secretary of DOT*, 880 F.2d 603 (1st Cir. 1989).

III. CONCLUSION

For the reasons stated in petitioner ACCA's briefs, the Court should reverse the Court of Appeals' decision and reinstate the District Court's dismissal of the Unions' complaint.

Respectfully submitted,

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